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Sport in Court: Assessing Judicial Scrutiny of Sports Governing Bodies

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The activities of bodies regulating sport activity have gained in both prominence and significance in recent years. There has been a similar growth in legal engagement with sport and its regulation and in the practice and study of sports law. These trends are, in no small part, driven by the heightened commercial significance of sport, to the individuals and organisations regulated, to the regulators themselves and to an ever broadening range of stakeholders.

The modern position of sports governing bodies represents a significant shift from their mid-nineteenth century origins – formed as genuinely self-regulatory coalitions of athletes, with the purpose of facilitating competition in each sport.[1] This metamorphosis – taking sport from amateur, 'club' governance to high levels of formal organisation, sophisticated regulatory codes and structures, corporatisation and commodification – represents a fundamental transformation of these bodies from their Victorian origins.[2]

In the modern era sports governing bodies occupy an important niche within society; quite aside from their economic prominence, they control access to important aspects of social life and have significant capacity to impact both livelihoods and reputations. Sports bodies wield extensive powers, whether it be the capacity to label an athlete[3] as a "drugs cheat",[4] to classify their behaviour as racist,[5] or restrict freedom of expression in the

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[1] R. Hutchinson, *Empire Games: The British Invention of Twentieth Century Sport* (Edinburgh & London: Mainstream, 1996), p.58.

[2] M. Moran, *The British Regulatory State: High Modernism and Hyper-Innovation* (Oxford: Oxford University Press, 2003), pp.73, 86-88.

[3] The term "athlete" is used throughout to denote participants in sport.

[4] e.g. Article 10.2 World Anti-Doping Code (2015).

[5] Football Association Regulatory Commission, *The Football Association v John George Terry* (2012) 4 October.

sporting arena.[6] Though most prominent legal disputes tend to arise in the context of elite sport – often as a result of significant financial consequences – the importance of sport, both to individuals[7] and to society as a whole,[8] is great. Sport plays a significant role as a policy instrument in pursuit of, for example, public health goals,[9] and – at an elite level – as a means by which to project political ideology and promote national standing.[10] As such the extent to which sports governing bodies are accountable through law for their rules and decisions is of significant contemporary interest. The issues arising in the context of sport are, too, of wider significance. Many, if not all, have resonance in judicial scrutiny of other arenas, for instance, that of clubs, trade unions and political parties, as well as other self-regulating sectors.[11]

This article assesses the English courts' role in securing appropriate levels of accountability. It commences with a brief summary of the development of judicial scrutiny of sports governing bodies and the contemporary approach. The main body of the article develops a critique of this position, highlighting, in particular, the weak substantive judicial scrutiny of sports governing body decisions and actions, and the limited scope for review of the rules and regulations of those organisations. The case for reform is then set out, driven by considerations relating to the nature and context of the powers exercised, an examination of judicial attitudes, and the wider impact of judicial scrutiny of sports governing bodies. This underpins the central claim of the article, that the principle of proportionality offers an important means by which these challenges can be addressed.

History

[6] Football Association Regulatory Commission, *The Football Association v Rio Ferdinand (Queens Park Rangers FC)* (2014) 15 October.
[7] J. Lord and M. Stein, "Social rights and the relational value of the rights to participate in sport, recreation and play" (2009) 27 *Boston University International Law Journal* 249.
[8] G. Jarvie with J. Thornton, *Sport, Culture and Society*, 2nd edn (London: Routledge, 2012).
[9] L. Donaldson, "Sport and exercise: the public health challenge" (2000) 34(6) *British Journal of Sports Medicine* 409.
[10] S. Jackson and S. Haigh, *Sport and Foreign Policy in a Globalizing World* (London: Routledge, 2009); see also *Finnigan v New Zealand Rugby Football Union (No 1)* [1985] 2 NZLR 159, 179.
[11] See, respectively, the examples of *Colgan v Kennel Club* (2001) Unreported, 26 October; *Breen v Amalgamated Engineering Union* [1971] 2 QB 175; *Evangelou v McNicol* [2016] EWCA Civ 817; and *Ghosh v General Medial Council* [2001] 1 WLR 1915.

The history of legal scrutiny of the rules and decisions of sports governing bodies is relatively short. The first noteworthy indication that an English court might be minded to make a meaningful intervention did not come until the late 1940s, with Denning L.J.'s dissenting judgment in *Russell v Duke of Norfolk*.[12] His Lordship noted that the Jockey Club had, "a monopoly in an important field of human activity. It has great powers and corresponding responsibilities."[13] Denning L.J. took the view that in a case with such serious consequences – removing a person's livelihood – there existed an obligation to act in accordance with the rules of natural justice. Prior to this there had existed little indication of any judicial appetite for intervention in sports regulation on any grounds.[14]

This judgment proved prophetic and reflected a broader shift towards accountability of sports governing bodies on the bases of the rules of natural justice and on that of *ultra vires* founded on a body's rules and regulations.[15] The justiciability of the decisions of governing bodies was affirmed in *Baker v Jones*, establishing the contractual nature of the relationship between sports governing bodies and those they regulate.[16] Denning L.J. further strengthened this approach in *Enderby Town FC v Football Association Ltd*,[17] overriding an ouster clause by which the Football Association purported to make its own decisions final and impervious to judicial scrutiny.

One early judicial intervention in the regulatory affairs of sports governing bodies remains the most extensive. *Eastham v Newcastle United Football Club Ltd*[18] represents the high watermark of English judicial intervention in sport's self-regulation.[19] *Eastham*

[12] [1949] 1 All ER 109.
[13] At 119.
[14] See M. McKee, "Boxing Clever: The Development of Legal Control over Administrative Decision-making in British Sports Associations" (1989) 6(1) *International Journal of the History of Sport* 88 at 92-95.
[15] For an assessment of the development of the law in this regard see, M. Beloff, Michael "Pitch, Pool, Rink…Court? Judicial Review in the Sporting World" (1989) P.L 95; P. Morris and G. Little 'Challenging Sports Bodies Determinations' (1998) 17 C.J.Q. 128.
[16] [1954] 2 All ER 553.
[17] [1971] 1 Ch 591.
[18] [1963] 3 All ER 139.
[19] See S. Boyes, '*Eastham v Newcastle United*' in J. Anderson (eds) *Landmark Cases and Decisions in Sports Law* (The Hague: TMC Asser Press, 2013).

marks a significant departure from the preceding case law, which was limited to consideration of matters of natural justice and *vires* decisions. *Eastham* was not so limited. Because Eastham's challenge was premised on the restraint of trade doctrine – which outlaws the imposition of unreasonable economic restraints between private parties, howsoever effected – the High Court was able to scrutinise the validity of the rules of the Football Association and the Football League themselves. Eastham challenged the reasonableness of football's 'retain and transfer' system. Under the scheme a professional footballer could be 'retained' by the club holding his registration – and thus be unable to sign for and take up employment with another club – even when the contract under which the retaining club employed him had expired. The High Court decision, that these rules were indeed unduly restrictive and thus unlawful, is a rare and notable instance of the striking down of a sports regulatory scheme.

Though the restraint of trade doctrine has been applied since, *Eastham* remains the most significant judicial intercession into sport's regulatory affairs.

The modern law

Determining justiciability

Much of the modern case law concerns justiciability and the legal basis of claims against sports governing bodies. This despite the recognition that the basis of the relationship between sports governing bodies and those regulated by them was to be regarded as contractual. This stems in large part from the Court of Appeal decision in *Law v National Greyhound Racing Club*.[20] In *Law* the Court rejected the governing body's application to strike out – on grounds of abuse of process – a greyhound trainer's challenge to a disciplinary sanction imposed upon him, made by way of a claim for breach of contract. *Law* has proven to be an authority of far greater significance than might initially have been imagined. This essentially positive decision – that arguments of abuse of process could not be deployed as a means of shielding the Club from scrutiny – has had a

[20] [1983] 3 All ER 300.

significant limiting influence on the body of case law where claimants have sought judicial review of sports governing bodies.[21]

Law was a significant authority in the resolution of a series of attempts to subject sports governing bodies to judicial review. This well documented chain of cases came about principally as a consequence of the decision of the Court of Appeal in *R v City Panel on Take Overs and Mergers, ex parte Datafin,*[22] which encouraged the view that sport's self-regulatory bodies might be considered amenable to judicial review. Each was ultimately decided to be inadmissible on the basis that the relationship between the regulator and regulatee was certainly consensual, if not necessarily contractual in nature and this has been the settled view since.[23] Though there were a variety of approaches adopted, the authority established by the Court of Appeal in *Law* was, in each case, a key factor.

This position would not necessarily have been problematic – the contractual approach was applied sufficiently generously to cover most situations, even those where the contractual nexus was significantly stretched. However, in *Modahl v British Athletics Federation (No. 2)*[24] the Court of Appeal struggled to reconcile the relationship between the parties with the law relating to implied contracts. Latham and Mance L.JJ laboured to the conclusion that such a connection existed, but in his dissenting judgment Jonathan Parker L.J. did not accept the existence of a contractual link. This reflected the earlier view of Lord Denning M.R. in *Enderby Town,* describing such contracts as, "a fiction … created by lawyers to give the courts jurisdiction".[25]

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[21] See J. Anderson, "An Accident of History: Why the Decisions of Sports Governing Bodies are not Amenable to Judicial Review" (2006) 35(3) *Common Law World* 173.
[22] [1987] 1 All ER 564.
[23] *R v Football Association of Wales, ex parte Flint Town Football Club* [1991] COD 44; *R v Disciplinary Committee of the Jockey Club, ex parte Massingberd-Mundy* [1993] 2 All ER 207; *R v Jockey Club, ex parte RAM Racecourses Ltd* [1993] 2 All ER 225; *R v Football Association Ltd, ex parte Football League Ltd* [1993] 2 All ER 833; *R v Jockey Club, ex parte Aha Khan* [1993] 1 WLR 909. Note, though, the position adopted in other jurisdictions, notably France, where sports governing bodies' actions are considered as administrative acts and subject to public law procedures. See generally, R. van Kleef, "Reviewing Diciplinary Sanctions in Sport" (2015) 4(1) *Cambridge Journal of International and Comparative Law* 3.
[24] [2002] 1 WLR 1192.
[25] *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] Ch 591, at 606.

The doubts created by *Modahl* were resolved by the judgment of Richards J., invoking the approach advocated by Professor Dawn Oliver,[26] in *Bradley v Jockey Club*, subsequently approved by the Court of Appeal. The judgments in *Bradley* recognised a private law supervisory jurisdiction, irrespective of the existence of a contract.[27] In acknowledging this jurisdiction, Richards J drew upon Lord Denning's judgment in *Nagle v Feilden*, that organisations with "predominant power" over a sector would be subject to the jurisdiction of the courts as a matter of public policy.[28]

The supervisory jurisdiction appeared, from *Bradley*, to be engaged only in cases where a person's right to work is threatened,[29] but is now more widely applicable following the judgment of Stanley Burnton J. in a further claim against the Jockey Club, *Mullins v McFarlane*.[30] In *Mullins* it was regarded as sufficient that the matters of concern to the claimant were of "importance".[31]

It should also be noted that there exists a further potential route by which the courts may scrutinise sports governing bodies: competition law. Like the restraint of trade doctrine, statutory competition law provisions establish cause of actions arising out of the economic relationship between the parties. Where an anti-competitive arrangement or abuse of dominant market position arises, there is the potential for litigants to invoke these provisions.[32] English courts have been required to engage with these measures only infrequently in the context of sport;[33] largely due to a prevalence of cross-border issues which has meant that recourse to European Union competition measures has predominated.[34]

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[26] D. Oliver, "Common values in public and private law and the public/private divide" [1997] P.L. 630.
[27] [2004] EWHC Civ 2164; [2005] EWCA Civ 1056.
[28] [1966] 2 QB 633 at 647.
[29] [2004] EWHC Civ 2164, at [35].
[30] [2006] EWHC 986 (QB) at [39]; though *cf Chambers v British Olympic Association* [2008] EWHC 2028 (QB) suggesting that this jurisdiction only extended to "right to work" cases.
[31] At [40]
[32] Respectively ss 2 and 18 Competition Act 1998
[33] See, for example, *Hendry v World Professional Billiards and Snooker Association Ltd* [2002] UKCLR 5
[34] See, for example, Case C-529/04 *Meca-Medina v Commission of the European Communities* [2006] ECR I-6991

The generous attitude to justiciability is tempered somewhat by a growing judicial preference for self-regulatory solutions to disputes. This judicial inclination is made manifest in recent cases concerning sports arbitration. In *Stretford v Football Association*[35] it was argued that a forced arbitration clause was a breach of the right to a fair hearing and of Article 6 of the European Convention on Human Rights. At first instance and on appeal the claim was rejected. Notably, both courts refused to accept the argument that the adhesionary nature of the arbitration clause rendered the rule illegitimate.

More recent cases have determined that a disciplinary process of a sports governing body may be legitimately classified as an arbitration for the purposes of the Arbitration Act 1996, without explicit agreement to this effect between the parties;[36] and that such proceedings could only be successfully challenged in court on the basis of a serious irregularity or error of law on the part of the arbitral body.[37]

The result of this judicial predilection is that many cases which might otherwise be litigated are channelled away into arbitrations. Though in *Enderby Town* Lord Denning rejected the capacity of sports governing bodies to oust overtly the courts' jurisdiction, it may well be that the arbitration clause is just as effective in limiting judicial scrutiny. The limited review capacity afforded national courts may force a claimant down a lengthy process to obtain in-depth, substantive, judicial consideration of their case.[38] It is the case that issues of great significance might be regarded as non-arbitrable as being beyond the capacity of the arbitral body, but establishing this could, in itself, be a costly and time consuming exercise for would-be litigants, with no guarantee of success.[39] An in-depth discussion of this issue is beyond the scope of this article, but it is nonetheless clear that

[35] [2006] EWHC 479 (Ch), [2007] EWCA Civ 238.
[36] *England and Wales Cricket Board Ltd v Danish Kaneria* [2013] EWHC 1074 (Comm); *Baker v British Boxing Board of Control* [2015] EWHC 2469 (Ch).
[37] *Danish Kaneria v England and Wales Cricket Board Ltd* [2014] EWHC 1348 (Comm); Arbitration Act 1996 ss 68-69
[38] See e.g. Case 40575/10 *Adrian Mutu v Switzerland*, Case 67474/10 *Claudia Pechstein v Switzerland*, pending before the European Court of Human Rights at the time of writing.
[39] See e.g. *Fulham Football Club (1987) Ltd v Richards and The Football Association Premier League Ltd* [2010] EWHC 3111 (Ch).

the growth of arbitration has had a significant influence in diverting cases away from the courts.

Putting aside for one moment the arbitration issue, while the decision in *Bradley*, taken along with the contractual, restraint of trade and competition law approaches, appears on its face it to offer broad access to court for would-be litigants, it does not address the nature and extent of the scrutiny as exercised through the principles and remedies deployed.

Substantive law

Focus on jurisdictional issues in challenges to sports governing bodies has deflected attention from in-depth consideration of applicable principle. However, it is well established that sports governing bodies may act only *intra vires,* in a manner consistent with their own regulatory frameworks, and within the general objectives of the organisation. It may also be possible for sports regulators to behave unlawfully where account is taken of irrelevant factors or, conversely, they fail to take account of relevant matters.[40]

The decisions in *Bradley* also identified the applicability of proportionality in such cases. Richards J. decided that, subject to falling within a "range of reasonable responses", a decision of a sports governing body will not be regarded as unlawful.[41] Though, as is discussed below, the intensity of this scrutiny is at a low level.

As established in *Eastham*, the restraint of trade doctrine allows for more searching scrutiny than the contractual/supervisory approach. This manifests itself in two respects. First, the doctrine permits the court to assess the legitimacy of the regulatory framework itself, as well measures adopted there under. Second, it involves a test of reasonableness which engages the court in a balancing exercise between the aim pursued and the

[40] *Fallon v Horseracing Regulatory Authority* [2006] EWHC 2010 (QB).
[41] At [43].

measure deployed; as such the doctrine involves much more intense scrutiny than the assessment of *ultra vires* and restrictive approach to proportionality in the contract/supervisory context. A similar type of analysis is facilitated by competition law. These are both, though, limited to economic restrictions.

It is similarly well established that sports governing bodies are compelled to act in accordance with the rules of natural justice and there has been no judicial hesitation in regarding them as being, in principle, accountable on this basis. Both limbs of the rules of natural justice – the right to a fair hearing and the rule against bias – have been deployed in the judicial scrutiny of sports governing bodies.[42]

Assessing the modern law

On its face the adoption of a judicial review-like private law process appears to represent a satisfactory solution to the problematic issue of judicial scrutiny of sports governing bodies. The uncertainty as to the appropriate claim to be made having been set aside, the path to judicial resolution of disputes is now clear.

Despite rejecting the applicability of judicial review, the courts have, nonetheless, imported the principles applied therein into cases where a contractual or public policy based private law supervisory jurisdiction is invoked. Indeed, it has been made plain that there exists an expectation that there will be a significant transplantation of public law principles into the private law context:

> "I would consider it surprising and unsatisfactory if a private law claim in relation to the decision of a domestic body required the court to adopt a materially different approach from a judicial review claim in relation to the decision of a public body."[43]

[42] See S. Gardiner *et al*, *Sports Law*, 4th edn (London: Routledge, 2011) at pp.127-134.
[43] [2004] EWHC Civ 2164 (QB), at [37], per Richards J.

However, it having been determined that sports governing bodies are not to be regarded as public bodies, amenable to the claim for judicial review – that they are different creatures – it is logical to conclude that the adoption of a judicial review-like approach should be open to scrutiny. It is, by extension, arguable that the principles deployed through judicial review are not necessarily compatible or their application justifiable. The topography of judicial review is, naturally, the product of the environment in which it has developed and is usually deployed. As a consequence the principles established therein are not of necessity suitable for the new task to which they have been put. Indeed, Rose J. made this plain in his judgment in *R v Football Association Ltd, ex parte Football League Ltd*:

> "[F]or my part, to apply to the governing body of football … principles honed for the control of the abuse of power by government and its creatures, would involve what, in today's fashionable parlance would be called a quantum leap."[44]

These competing perspectives suggest a tension. The characteristics of sports governing bodies are regarded as worlds away from those of genuinely public bodies, but are considered materially similar for the purposes of the application of principle.

On that basis it is appropriate to consider, necessarily briefly, the rationale underpinning the claim for judicial review. This is contested ground,[45] however, whether one subscribes to the 'parliamentary sovereignty' or 'common law' accounts, it is reasonable to summarise to the effect that constitutional considerations drive a form of intervention limited to the maintenance of legality.[46] Equally, the constitutional context empowers judges to constrain government in order to secure this legality.

As sports governing bodies are not considered to be public bodies it must also follow that these constitutional concerns are not necessarily relevant to them and permits the

[44] [1993] 2 All ER 833 at 848.
[45] See J. Jowell, "Of vires and vacuums: the constitutional context of judicial review" [1999] P.L. 448.
[46] See T. Allan, "Constitutional Dialogue and the Justification of Judicial Review" [2003] 23(4) O.J.L.S. 563.

possibility that a different approach is appropriate, presenting a challenge to the wholesale adoption of a judicial review-style approach.

There may too be private law limitations on substantive intervention in the rules and decisions of sports governing bodies in which a court will not intervene. It is certainly the case that the law of contract creates a 'space' in which private parties can construct agreements tailored to their own ends. Such agreements are not unconstrained, they are subject to the formalities of the creation of the contractual arrangement and the statutory and common law limitations as to the circumstances in which a contractual relationship may be created, what may be included in it and result from it.[47] The reality is that these do not impose extensive demands on the substance of a contract where the nature of the contract is regulatory in nature. In this context, in essence, the courts' role is that of patrolling the limits of the contractual space, with relatively few opportunities to intervene in substantive matters.[48] Thus the court will ensure that the rules – as the terms of the contract – are observed, but will stop short of scrutiny of the rules themselves in most situations. These boundaries might be legitimately characterised as being just as generous, if not more so, as those effected under the public law approach.

These broad public-private parallels could reasonably be interpreted as imposing severe limits on the scope of this discussion. If the nature of judicial intervention in the public and private spheres is broadly comparable, then it might legitimately be questioned quite why judicial oversight of these bodies could be regarded as being in some way unsatisfactory. The response to this is to highlight that, in the same way as they do not 'fit' in the public law sphere, these bodies are not easily accommodated in private law. Lord Denning, in *Enderby Town*, observed the "fictional" nature of the 'contractual' relationship between sports governing bodies and their regulatees, noting that rules are legislative in nature: adhesionary, take-it-or-leave-it arrangements presented by a monopolist.[49]

[47] See, for example, Part 1 Unfair Contract Terms Act 1977; Part 1 Consumer Rights Act 2015.
[48] H. Collins, *Regulating Contracts* (Oxford, Oxford University Press, 1999) p.57.
[49] At 606.

The conclusion to be drawn from this is that sports governing bodies fall into neither the public law or private law rationales governing judicial intervention with any degree of comfort.[50] The judicial stationing of these public/private hybrids in the sphere of private law might be regarded as a matter of judicial convenience, preferring to deal in the more flexible environs offered there in contrast to the more constitutionally sensitive public law domain.

That sports governing bodies inhabit this grey zone overlapping or in between the public/private divide is not in itself grounds to criticise judicial approaches to their scrutiny. However, it lends legitimacy an assessment of judicial attitudes and supports the claim that the uncritical deployment of either the public or private approach to intervention is unsatisfactory. While the adoption of either approach might be regarded as justifiable, a more clear articulation of the rationale for doing so is needed. Recognition of this hybrid position highlights and permits consideration of two significant problematic issues in the judicial scrutiny of sports governing bodies.

Limited substantive review of sports governing bodies' rules

The first issue is the self-imposed judicial limitation on scrutiny of the rules and regulations of these bodies. While assessment of the consistency and 'reasonableness' of decisions is well established there are few, if any, examples of judicial scrutiny of the substance of the rules themselves, save for the protection of economic rights in the application of the restraint of trade doctrine and competition law provisions to sports rules and regulations.[51] This, I argue, is a consequence of the adoption of a judicial review-style approach. In the context of judicial review constitutional demands effectively proscribe judicial scrutiny of primary legislation. Indeed, when considering

[50] On the public/private divide see, Lord Woolf, "Public law – private law: why the divide? – a personal view" [1986] P.L. 220; G. Borrie, "The Regulation of Public and Private Power" [1989] P.L. 552; D.Oliver, *op cit* n. 26.

[51] An example of such a rule being struck down is to be found in the appeal panel decision in, *In the matter of an appeal pursuant to paragraph 3.11 of the PGB minimum standards criteria involving London Welsh Rugby Football Club Limited and The Rugby Union and Newcastle Falcons Rugby Football Club*, 29 June 2012.

the exercise of executive power judicial review is specifically limited to scrutiny of the scope and proper exercise of that power, and not of the validity of the power itself. The simple transplantation of this approach from the public law sphere into private law cases involving the activities of sports governing bodies has the consequence that such regulatory schemes are largely untouchable by the judiciary.

This is problematic for a number of reasons. First, it permits these organisations, to operate monopolistic, adhesionary regulatory regimes, which hold a significant place in society and in the life of many individuals, largely free of constraint. While it is true that abuses of economic power will fall to be considered under the auspices of the restraint of trade doctrine or statutory competition law provisions, the social and personal aspects of their sphere of control are, at best, only lightly supervised. This is a particular problem because the 'legislators' in the sports governing bodies are not subject to the same level of democratic accountability as Parliament. Though the ability to call legislators to account at the ballot box is a blunt instrument at best, no such democratic legitimacy is present in the case of most sports governing bodies. Though they are often described as self-regulatory – a term which asserts at least an element of accountability to regulated parties – the reality is that these bodies are better characterised as 'decentred' regulators.[52] This problem is exacerbated by the 'capture' of the regulator by strong interests groups within a sport. This is exemplified by recent Parliamentary reports into the regulation of football in England – highlighting the dominance of the Premier League in the institutional structures of the Football Association – which has resulted in sustained criticism and calls for legislative intervention.[53] This apparent disenfranchisement means that greater emphasis falls on judicial processes in securing participants' input into, and scrutiny of, 'their' self-regulated activity.

This lack of reflexivity is exacerbated by the fact that many of the rules and regulations adopted by sports governing bodies at a domestic level are not of their own creation;

[52] J. Black, "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory" World' [2001] 54 C.L.P. 103.
[53] House of Commons Culture, Media and Sport Committee (2012-13) *Football Governance Follow-Up: Volume 1*. HC 509, p.26.

instead they are mandated by the international body responsible for the regulation of a particular sport.[54] Even then the sport's international regulator may have such requirements imposed from outside, the requirement of the International Olympic Committee that Olympic sports subscribe to the World Anti-Doping Code, for example.[55]

Where regulatory schemes have been judicially evaluated, individual cases have been met with a conservative response. This has been the case whether the claimants have sought to vindicate rights under statutory provision – most notably equalities legislation[56] – or through claims founded in restraint of trade. In respect of the latter, in *Stevenage Borough FC v Football League*, Carnwath J. shifted the burden of proof onto the claimant, on the basis that the challenge was brought to the rules and regulations deployed in the public interest which were, on this reasoning, to be treated in a manner akin to those of a public body.[57]

The result of all this is that sports governing bodies are relatively unconstrained in their rule-making activities. Though rules in breach of restraint of trade and competition law measures have been and will be struck down, there are few, if any, examples of successful challenges to the rules of sports governing bodies on the basis of contract/private law supervisory jurisdiction.

Weak substantive review of sports governing bodies' actions

Beyond the level of rule-validity, the second major concern raised by judicial treatment of sports governing bodies is the 'light touch' approach to decisions made under the regulatory frameworks.

[54] See e.g. *Cooke v Football Association* (1972) *The Times*, 24 March.
[55] Olympic Charter, Rule 40.
[56] See e.g. *Bennett v Football Association* (1978) Court of Appeal, 28 July, Transcript No. 591; S. Patel, Inclusion *and Exclusion in Competitive Sport: Socio-legal and regulatory perspectives* (Oxford: Routledge, 2015), Chapter 4.
[57] (1996) *The Times*, 1 August.

In sports cases refusal to intervene, or limited intervention, has frequently been on the basis of specialist, often technical, knowledge and that a court is ill-suited to closely assessing such decisions.[58] However, such an approach cannot justify a blanket approach to every aspect of a regulator's activity. It is, nonetheless, inherent in two prominent cases. In both *Bradley* and *Fallon* the courts emphasised the expert nature of the respective regulators.[59] The expertise of the governing body was also invoked by Lord Denning MR in *Enderby Town*, suggesting that a specialist sports tribunal may be better placed to deliver justice than a court of law.[60] In *McInnes v Onslow-Fane*, Megarry V-C made this position plain:

> "I think that the courts must be slow to allow any obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities, which *those bodies are far better fitted to judge than the courts*"[61]

This rationale was similarly deployed in *Stevenage* and formed part of the reasoning behind Carnwath J's decision, noted above, to reverse the proof burden usual in restraint of trade cases.

A second strand of reasoning – the desire not to frustrate activities carried out in the public interest – has also driven the low-intensity approach. In *Stevenage* Carnwath J. determined that this would limit challenges to instances of "arbitrary or capricious" behaviour or the existence of a "pernicious monopoly". This was also made out in stark terms by Lord Woolf MR in *Wilander v Tobin*, a challenge by two professional tennis players to a ban imposed for infringements of anti-doping rules:

[58] R. Baldwin and M. Cave, *Understanding Regulation: Theory, Strategy and Practice*, (Oxford: OUP, 1999) p.132.
[59] *Bradley* at [26], *Fallon* at [63].
[60] At 605.
[61] [1978] 1 WLR 1520 at 1535. Author's emphasis.

> "While the courts must be vigilant to protect the genuine rights of sportsmen … they must be equally vigilant in preventing the court's procedures being used unjustifiably to render perfectly sensible and fair procedures inoperable."[62]

This echoes the earlier view of Megarry V-C in *McInnes v Onslow Fane*:

> "Bodies such as the [British Boxing Board of Control], which promote a public interest by seeking to maintain high standards in a field of activity which might otherwise become degraded and corrupt, ought not to be hampered in their work without good cause."[63]

Both acknowledgement of expertise and a desire to limit the impact of any intervention based on public interest considerations evidence a significant degree of judicial reluctance to engage to any great extent with the affairs of sports governing bodies.

This is evident, too, in the application of the proportionality principle in sports cases; though it should be noted that there has been little opportunity for the approach to be fully developed. However, where it has been considered, application of the proportionality principle has not been elucidated in any detail and has not – explicitly at least – taken account of the various approaches to the test established by the general jurisprudence, perhaps most notably that developed in, and following on from, *Huang v Secretary of State for the Home Department*.[64]

In *Bradley*, the High Court did not itself assess the proportionality of the Jockey Club Appeal Panel determination but, instead, chose to consider whether the application of the proportionality principle *by the Panel* was *reasonable*. In making this assessment the Court was, in essence, making an inquiry as to whether the Panel's approach to proportionality fell within a range of reasonable responses in that it was one which a reasonable panel might have reached – proportionality viewed through the lens of

[62] [1997] 2 Lloyd's LR 293 at 301.
[63] *Op cit* at 1535. See also *Baker v British Boxing Board of Control* [2015] EWHC 2469 (Ch) at [20]-[22].
[64] [2007] UKHL 11 at [19].

irrationality. Again, this approach was explained by reference to the desire not to usurp the function of the primary decision-maker.

By contrast, in *Fallon*, a much more direct assessment of the proportionality of the Horseracing Regulatory Authority Panel's decision was evident. Davis J. undertook an overt balancing exercise between the competing interests of the parties – the detrimental effect on Fallon – in terms of participation and reputation – weighed against the potential harm to perceptions of the integrity and reputation of the sport. Despite the more direct nature of the evaluation, the judgment is not cast in the language of proportionality, nor does it adopt the very clear structure of the tests outlined below.

Arguably, both restraint of trade and competition law cases can involve a form of proportionality test – weighing up the interests of the parties, and of the 'public interest' in determining the legitimacy of a decision or rule. However, it must be noted that both apply only in the where significant economic implications arise.

The case for reform

There is therefore a claim to be made in favour of reform in order to address the concerns outlined here. There are six broad, interrelated grounds for this.

First, sports governing bodies exercise monopoly power over individuals and other stakeholders, including, in some cases, powers analogous to those ordinarily exercised by state bodies.[65] Indeed, in some respects, they effectively displace the activities of the state where their disciplinary processes result in a rolling-back of the reach of the criminal and civil law.[66] In this context, and others, sports governing bodies have effectively become a

[65] R. Ellickson, "When Civil Society Uses an Iron Fist: The Roles of Private Associations in Rulemaking and Adjudication" [2016] American Law and Economics Review 1

[66] See, in particular, the judgment of Lord Woolf C.J. in *R v Barnes* [2004] EWCA Crim 3246 at [5] and the Crown Prosecution Service/National Police Chiefs' Council/Football Association/Football Association of Wales (2015) *Agreement on the handling of incidents falling under both criminal and football regulatory jurisdiction*.

proxy for the state or delegated "deputy regulator"[67] – perhaps even stretching to their enrolment by the state.[68] Where evidence exists of the exercise of public power by sports governing bodies, it is plainly arguable that they should be accountable on the same basis as 'pure' public bodies; indeed there may be a more persuasive claim given the lack of alternative avenues of accountability. This approach may militate a closer scrutiny of some aspects of sports governing bodies' activities, but clearly not all elements will be considered to be 'public'. However, the claim to greater intensity of scrutiny can be extended beyond this, premised on the adhesionary character of sports governing bodies' rules and regulations. I argue that the take-it-or-leave-it nature of sports governing bodies' regulatory schemes mandates closer judicial scrutiny when coupled with significant consequences for regulated parties.[69] In particular this is because the relative power of the parties means that those subject to the regulations have little or no capacity to effectively negotiate its terms.[70] Admittedly there exists no practical scope for such negotiation between the regulators and regulated on an individual basis – to do so would result in chaos and render the activity ungovernable – but the engagement in collective bargaining of the sort prevalent in American major league sport would go some way to ameliorating this concern. In engaging in more intensive scrutiny a court would be able to re-balance the interests of the parties in a way which overcomes the limitations created by the adhesionary regulatory scheme. In this regard greater judicial scrutiny has the capacity to meet concerns premised both on the impact of the powers exercised and the power imbalance between the parties.

Second, despite the monopolistic, adhesionary and far-reaching nature of these – often partly quasi-public – regulatory regimes, there is an absence of other mechanisms of accountability. Many public bodies, if not all, are the subject of much greater intensity of scrutiny, from a significantly wider range of agents. Public bodies are likely to encounter challenges from Parliament and its Select Committees, from ombudsmen and other state-

[67] Collins p. 219.
[68] J. Black, "Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation" [2003] P.L. 63; see e.g. *Massingberd Mundy* at 219 per Neill L.J., *Aga Khan* at 916 per Bingham M.R.
[69] C. Scott, "Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance" [2002] 24(1) *Journal of Law and Society* 56, 63.
[70] N. Duxbury, "Robert Hale and the Economy of Legal Force" [1990] 53 M.L.R. 421, 434-437.

backed complaints mechanisms and from, for example, the National Audit Office.[71] Sports governing bodies – usually constituted as corporate bodies of one form or another – face little comparable scrutiny. Though this accountability vacuum might not *compel* a court to exercise more intensive scrutiny, it should be regarded as counterbalancing the worry of being unduly burdensome given the absence of these other demands to accountability.

Third, the law as it stands suffers from substantial internal inconsistency. The pattern evident from the case law is that economic rights command high levels of protection from the courts, while other values such as participation, reputation, status, social inclusion and psychological well-being rarely, if ever, fall for meaningful consideration. Though these values underpin the rationale for the extension of jurisdiction, it is unusual for them to be remedied or even recognised in the subsequent substantive analysis. The result is internal inconsistency; it is clearly arguable that interests acknowledged as sufficiently important to drive the recognition of a specific jurisdiction based on public policy must, as a matter of logic, fall for consideration and evaluation in the substantive analysis of such cases. Indeed, the rationale for the extension of jurisdiction appears fatally flawed if the values which underpin it are not, in the pinch, even considered.

Fourth, the reticence of the courts to exercise higher intensity review is premised on misplaced assumptions about the function of the court in these situations, and a misconceived assessment of their own capacity and expertise. It is arguable that this comes about, at least in part, because of the acknowledged 'borrowing' from public law in subjecting sports governing bodies to scrutiny. In characterising the scrutiny process as being substantially similar to judicial review, there has been a failure to recognise that decisions about the 'proper' role of the court in judicial review are inevitably characterised by judicial restraint – that is self-limitation of action premised on

[71] See D. Oliver, "Regulation, Democracy, and Democratic Oversight in the UK" in D. Oliver, T. Prosser and R. Rawlings (eds), *The Regulatory State: Constitutional Implications* (Oxford: OUP, 2010).

constitutional principle.[72] Such a limitation is inherent in the law of contract too – the role of the court is usually to enforce the terms, not to adjust or amend them – but it is clear that the law of contract is capable of adapting to permit greater intervention in particular social and economic contexts.[73] In the private law supervisory jurisdiction in which sports governing bodies sit it seems that this residue of restraint remains. This is clearly not as a consequence of constitutional considerations, but through recognition that there is a public interest in not imposing too great a burden on regulators. This conservative attitude appears to go hand in glove with the application of a judicial deference approach in sports cases – relating to the capacity of the court to adjudicate in respect of matters going to expertise or specialist knowledge. In reality the 'expertise' of sports governing bodies is overstated – at least in general terms. That their operations are related solely to a relatively narrow field does not of necessity make these bodies the custodians of complex information which a court cannot synthesise and understand. To treat sports governing bodies as akin to those organisations dealing in complex issues in the fields of science, technology, ethics and the like is to draw that classification too broadly. Sports governing bodies will undoubtedly have a great deal of knowledge and information about their sport, experience of its regulation and, in some instances, this will be complex, requiring the exercise of expert judgment. However, sport is essentially simple; indeed it depends upon simplicity for its success and popularity. The adoption of a uniform approach is unsustainable; the issues that arise will vary enormously in terms of complexity and demands on expertise in adjudication. The suspicion arises that, at its root, this approach is a result of judicial discomfort in dealing with sporting matters, perhaps succumbing to their "mystification".[74] Once established, the existence of precedent provides ample justification for perpetuating a position which limits judicial scrutiny. An instinctive response that a challenged measure is "perfectly sensible and fair" is more easily given effect by a low/no-intensity approach premised on institutional function and competence, than through a more difficult, higher-intensity analysis in

[72] On 'deference' and 'restraint' see J. Rivers, "Proportionality and variable intensity of review" [2006] 65(1) C.L.J. 174.
[73] Collins pp.48-49.
[74] Moran at p. 92.

which the competing values must be identified and weighed.[75] This perhaps reflects Professor Hugh Collins' assertion that "club markets", a term encompassing sports governing bodies, should be afforded a significant degree of autonomy by the courts, lest judicial intervention upset the delicate balance created therein.[76]

Nonetheless, the jurisprudence of the Court of Justice of the European Union, as it relates to the rules of sports governing bodies, demonstrates the capacity of that court to differentiate between factors involving the exercise of expertise and those in which the court may legitimately intervene.[77] Indeed much of the Court of Justice's attention – when dealing with cases involving sports regulators – has been directed to classifying the range of situations which might arise and the appropriate intensity of its scrutiny in each instance.[78] In the particular field of competition law, the Court of Justice has developed an approach to 'ancillary' restraints which has been deployed in the context of sport in *Meca-Medina v Commission*.[79] In particular the Court of Justice rejected the first instance judgment that as the issue of anti-doping regulation fell within the 'sporting exception' its evaluation was outwith the capacity of the court As such, the Court was able to undertake a balancing exercise strikingly akin to a proportionality review of the sort discussed below. Similarly, in *Eastham* the High Court demonstrated the capacity to distinguish between situations involving the exercise of specialist knowledge or expertise, where the court should deploy caution, and those where it might reasonably exercise more intense scrutiny:

> "The system is an employers' system, set up in an industry where the employers have succeeded in establishing a united monolithic front all over the world, and where it is clear that for the purpose of negotiation the employers are vastly more strongly organised than the employees. No doubt the employers all over the world consider the system a good system, but this does not prevent the court from

[75] T. Allen, "Human Rights and Judicial Review: A Critique of 'Due Deference'" [2006] C.L.J. 671.
[76] At pp. 218-221.
[77] See e.g. Case C-415/93 *Union Royale Belges des Sociètès de Football ASBL v Bosman* [1995] ECR I-4192 at [76]-[77].
[78] See R. Parrish and S. Miettinen, *The Sporting Exception in European Union Law* (The Hague: TMC Asser Press, 2008).
[79] *Op cit*, n.34.

considering whether it goes further than is reasonably necessary to protect their legitimate interests." [80]

Fifth, litigation can serve a purpose greater than the adjudication of the individual case; it also permits communication between the judiciary and legislators and/or policy makers or, in this case, the regulator.[81] A minor injustice inflicted on an individual may seem inconsequential when weighed against the interests of efficacious administration of a whole sport; however, the court is not just addressing the grievance of one individual, but is also effectively communicating to the defendant and, more likely, all sports governing bodies, the nature of their obligations and limitations. By refusing jurisdiction or limiting the intensity of review to too significant a degree, a court is effectively legitimising, and thus compounding, such injustices on a grand scale. The determination of the court is not limited in effect to the case immediately before it, but is likely to influence practise in all future instances of a similar nature. This emphasises the importance of litigation as an effective means of 'negotiation' between the parties.[82] Seen in this light a claim can be perceived not only as one brought in support of the interests of the individual litigant, but also of the class of stakeholder to which they belong – *Eastham* is a good example of this. It should be emphasised that it is not only the *ratio* of cases which have this effect, *obiter dicta* can also have a significant impact in channelling the behaviours of sports regulators. A notable example of this is the litigation before the Swiss Federal Tribunal in *Gundel v FEI*.[83] In a challenge to the International Equestrian Federation (FEI) it was argued that the Court of Arbitration for Sport lacked legally required standards of independence and impartiality. Though this claim was dismissed in the individual case, the court opined that the decision may have been different had the facts been subtly altered. The case resulted in the creation of an International Council of Arbitration for Sport (ICAS) to oversee the running and financing of the CAS and thus creating sufficient independence from the IOC, and which was demonstrated to be a suitable

[80] At 438.
[81] P-J. Yap, "Defending Dialogue" [2012] P.L. 527; R. Clayton, "Judicial deference and "democratic dialogue": the legitimacy of judicial intervention under the Human Rights Act 1998" [2004] P.L. 33, 42-43.
[82] G. Goodpaster, "Lawsuits as Negotiations" [1992] 8(3) *Negotiation Journal* 221.
[83] (1993) Swiss Federal Tribunal, 15 March.

response when the question arose subsequently.[84] A similar instance can be found in domestic case law where the issue of an interim injunction on the basis that disciplinary procedures were *arguably* unlawful, prompted the Welsh Rugby Union to make amendments to its rules.[85]

Sixth, this indirect impact of litigation assumes a greater importance than might be first imagined, given the increasing deployment of arbitration as a means of resolving claims against sports governing bodies. As noted above, the prevalence of arbitration over litigation in sports disputes has had the result that the frequency with which courts are provided with the opportunity to decide such cases, and to set out the applicable principles, is much reduced. The consequence is that those cases which do fall for judicial consideration obtain a significance stretching beyond the individual case – the principles set out therein will then be applied in subsequent arbitrations. The risk flowing from this is that a lack of clarity or detailed explanation of applicable principle will become genetically coded into subsequent arbitrations as it has into litigation. Building on the *obiter dicta* claim made above, it is not that the courts are likely to create direct precedent on the interpretation or application to be given to each and every situation; but that they have opportunities to develop and articulate general principle and to provide guidance on its application.

Conclusions: proportionality as the next step?

The adoption of a more overt, robust approach to the proportionality test is an ideal vehicle by which to address these demands for greater sophistication and transparency in the scrutiny of sports governing bodies.

The effective deployment of the proportionality principle would amount to judicial recognition that the extent, impact and public nature of the powers and exercise of power by sports governing bodies, in the context of an accountability vacuum, necessitate a

[84] *Lausutina v IOC and FIS*, (2003) Swiss Federal Tribunal, 27 May.
[85] *Jones v Welsh Rugby Football Union* (1997) *The Times*, 6 March; (1998) *The Times*, 6 January.

more nuanced judicial assessment and response. This is because the principle permits a more flexible approach than the test of rationality presently adopted. It permits the court to retain and reflect concerns relating to its expertise and the public interest in good administration, whilst overtly balancing the legitimate interests of the parties to the litigation.[86]

The notion of proportionality as a free-standing ground for judicial review, outwith the context of human rights cases, is one which is gaining traction, with the acknowledgement in the Supreme Court that this is something with which the Court will have to grapple in the not too distant future.[87] That this is the case, even given the constitutional constraints within which judicial review operates, it should be a relatively easy step to take for private law cases involving sports governing bodies to engage in a more vigorous assessment of the proportionality of a challenged measure. In this sense the private law case law is ahead of judicial review; it has already been recognised in *Bradley* and the cases which have followed that sports governing bodies are required to act proportionately. Nonetheless, as set out above, the articulation and application of the test in those cases was not explicit and lies at the state-limiting, rather than rights-optimising end of the proportionality spectrum.[88]

The nature of the proportionality principle in English law remains contested and is beyond the scope of this paper;[89] nonetheless there appears to be a reasonable degree of consensus that it involves assessment by the court in the following terms:

- the legitimacy of the pursued objective;
- the suitability of the measure for achieving that objective;

[86] See *R. (on the application of Lumsdon) v Legal Services Board* [2015] UKSC 41 as an example of this in a regulatory context.
[87] See *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 at [271] per Lord Kerr; *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3 at [55] per Lord Carnwath.
[88] Rivers at 176.
[89] See, in particular, the problems with the proportionality principle highlighted in Lady Justice Arden, "Proportionality: the way forward?" [2013] PL 498 at 515. See also the challenges to proportionality as part of a judicial review framework in T. Hickman "Problems for Proportionality" [2010] NZLR 303, and J. King, "Proportionality: A Halfway House" [2010] NZLR 327.

- the necessity of the measure to achieve that objective; and
- whether an appropriate balance is struck between the affected right and the interest pursued.[90]

This systematic, structured approach would permit a court to address more overtly the balancing of the various factors regarded as apposite in the decision-making process. This was made plain by Lord Mance in *Kennedy v Charity Commission (Secretary of State for Justice intervening)*:

> "The advantages of the terminology of proportionality [over reasonableness review] is that it brings structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance or benefits and disadvantages."[91]

It is arguable that the existing, limited analysis of the detail of the proportionality principle in sports cases is a manifestation of judicial discomfort in reconciling demands for accountability with a desire to maintain the relative autonomy of sports governing bodies; or, perhaps, a sense that the principle underpinning the application is so obvious as to obviate the need for a fulsome explanation. Whatever the reason, the value of a full and explicit exposition of proportionality has been recognised recently by the Supreme Court; in *Youssef* Lord Carnwath indicated that a clear articulation of the approach to be adopted was desirable, not least to provide clarity for the lower courts.[92] Though the context of challenge to sports governing bodies is significantly narrower than the general need for clarification of the principle, this does provide succour for the notion that greater judicial transparency in the articulation and application of the proportionality principle is desirable as a means of providing guidance to subordinate bodies – in this case sports arbitral tribunals – faced more frequently with the task of adjudication. It would also

[90] See the articulation of this by Lord Sumption in *R (o/a Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2014] UKSC 60, at [19]-[20], reflecting the approach adopted in *Bank Mellat v HM Treasury(No.2)* [2013] UKSC 39.
[91] [2014] UKSC 20, at [54]; see also *Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening)* [2015] UKSC 19 at [96]; *Bank Mellat (No.2)* at [66] per Lord Reed.
[92] At [55].

assist sports governing bodies in appreciating the demands upon them and thus lead to better governance.

Similarly the adoption of this structured approach would necessarily involve a court in addressing, in its substantive analysis, the interests which have led to the development of a private law supervisory jurisdiction. This would meet the criticisms based on internal inconsistency, set out above.

The approach suggested would undoubtedly address one major criticism outlined in this article, that of weak substantive review of sports governing bodies' decision-making. Though the application of a proportionality principle might not compel courts to intervene more frequently, it would make the rationale for their position explicit. While the outcome of many cases would remain unaltered, the careful consideration required would prevent courts taking a 'shortcut' in their reasoning, deferring unduly to the expertise of the regulator or invoking the public interest, without overt consideration of competing interests which will produce more transparently just decisions.

Such an approach could also be advanced as a means of addressing the other major criticism of the present approach, the lack of review of sports regulatory frameworks themselves. This would be a more significant development, in that it would take the courts into largely uncharted territory. However, given the adhesionary, legislative nature of these rules, that in many cases they are quasi-public in nature, and that there are limited – if any – other mechanisms for challenge, it is arguable that the extension of judicial oversight is appropriate. This would create some degree of parity between economic interests infringed by a regulatory scheme – subject to challenge through the restraint of trade doctrine, as in *Eastham*, and through statutory competition law provisions – and the non-economic interests already judicially acknowledged as being sufficient to give the courts jurisdiction.

The approach advocated here is open to challenge on the basis that it would be too interventionist, frustrating the public interest in the effective administration of sport by

putting the courts in the place of the regulator. However, it is clear that the proportionality principle is not intended to be applied to effect a merits review, so as to permit the court to supplant the original decision- or rule-maker.[93] The proportionality principle as it has been described in the English case law allows for a variable intensity of scrutiny, dependent on context.[94] It is open to a court to take account of a variety of contextual factors – including the magnitude of the 'right' asserted and the nature of the measure under challenge – in determining the appropriate intensity of review in any given case. In the context of sport, as well as taking account of the sort of individual interests advanced in this article – participation, reputation, status, social inclusion and psychological well-being – it would be legitimate for a court to consider factors such as expertise and the wider public interest in determining how closely to scrutinise the legitimacy of any rule or decision. As outlined above, English courts have demonstrated the capacity to appreciate and accommodate such contextual factors in restraint of trade and competition law challenges to sports governing bodies; it would seem perverse to suggest that they lack the competence to assess these in the context of other cause of actions.

It must also be emphasised that this proposed approach is not intended to extend the courts' role beyond that of a supervisory one; but to buttress the effectiveness of judicial scrutiny such that the supervisory function is meaningful, responsive and suitably robust. In particular, this means that the approach should be sensitive to and more accurately reflective of the particular and peculiar sporting context in which it is applied. In doing so it needs to be ensured that there is adequate judicial reflection on the suitability and applicability of values and principles transplanted from the public law environs of judicial review.

While the approach adopted in *Bradley* and developed since is to be welcomed as largely resolving the jurisdictional issues regarding sports governing bodies, this can only be regarded as a half-way house in securing appropriate levels of accountability for these

[93] See *Bank Mellat (No.2)* at [21] per Lord Sumption, and [71] per Lord Reed; *Keyu* at [133]-[134] per Lord Neuberger, and [272] per Lord Kerr.
[94] See, e.g. *Kennedy* at [51] per Lord Mance; *Bank Mellat (No.2)* at [69]-[70] per Lord Reed.

organisations. There exists a compelling case to believe that the courts can, and should exercise more searching scrutiny of sports governing bodies – both by more robust and overt application of existing principles in the case of decision-making and, as a general principle, by the extension of the existing supervisory jurisdiction as a means of testing the legitimacy of bodies' rules and regulation. The emerging principle of proportionality should be deployed as an important instrument by which to secure suitable levels of scrutiny and accountability through the courts, whilst maintaining an appropriate degree of regulatory autonomy.